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In the Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-1453

NEWSPAPER AND PERIODICAL DRIVERS & HELPERS UNION, LOCAL 921, INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN & HELPERS OF AMERICA,
Petitioner,

vs.

NATIONAL LABOR RELATIONS BOARD,
Respondent,

and

SAN FRANCISCO NEWSPAPER PRINTING CO. INC.,
Respondent,

and

DOUGLAS BROWN, WALTER DELONG, PHILIP T. WALKER, MARVIN W. WEISSENSEE, KENNETH C. WOLLMAN, JOHN ROY CONWAY, LEROY LESTER HOLBROOK, DARRELL E. BAKER, and WILLIS P. KOLB,
Respondents.

Petition for Writ of Certiorari To the United States Court of Appeals for the Ninth Circuit

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NEWSPAPER AND PERIODICAL DRIVERS & HELPERS UNION, LOCAL 921, INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN & HELPERS OF AMERICA,

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Respondents.

Petition for Writ of Certiorari To the United States Court of Appeals for the Ninth Circuit

Newspaper and Periodical Drivers & Helpers Union, Local No. 921, International Brotherhood of Teamsters, Chauffeurs, Warehousemen & Helpers of America petitions

for the issuance of a writ of certiorari to the United States Court of Appeals for the Ninth Circuit to review its judgment of February 18, 1975 entered against petitioner.

OPINIONS BELOW

The opinion of the court below is reported at 509 F.2d 99, and is printed as Appendix "A" to this petition. The Supplemental Decision and Order of the National Labor Relations Board, which was before the court below on petitions for review and for enforcement, is reported at 204 NLRB No. 60, and is printed in Appendix "C" to this petition.

JURISDICTION

The opinion of the court below was entered on December 23, 1974, and the judgment of the court below was issued on February 18, 1975. The Court has jurisdiction of the proceeding under 28 U.S.C. Section 1254(1).

QUESTIONS PRESENTED

Whether a clause in a collective bargaining agreement which continues a historical practice of progressively expanding a bargaining unit of distribution employees of metropolitan newspapers into suburban areas violates Section 8(e) of the National Labor Relations Act where its effect is to terminate dealerships of independent contractors who previously performed suburban distribution work.

STATUTORY PROVISIONS INVOLVED

The statutory provision involved in this case is Section 8(e) of the National Labor Relations Act (29 U.S.C. Section 158(e)), which insofar as applicable reads as follows:

> "(e) It shall be an unfair labor practice for any labor organization and any employer to enter into any contract or agreement, express or implied, whereby such

employer ceases or refrains or agrees to cease or refrain from handling, using, selling, transporting or otherwise dealing in any of the products of any other employer, or to cease doing business with any other person, and any contract or agreement entered into heretofore or hereafter containing such an agreement shall be to such extent unenforceable and void:"

STATEMENT OF THE CASE

1. The Parties

Petitioner, hereafter referred to as the Union, has long represented the drivers who distribute the metropolitan newspapers in San Francisco, California. Respondent San Francisco Newspaper Printing Co., Inc., hereafter referred to as the Company, is jointly owned by, and performs the printing, sales, promotion and distribution work for the two major daily newspapers in San Francisco, The San Francisco Chronicle and The San Francisco Examiner. The Union and the Company have had a collective bargaining relationship since 1965, when the Company was organized. Prior to that time, and dating back to 1937, the Union was party to a series of collective bargaining contracts with all of the daily newspapers in San Francisco, each of which operated its own distribution system. In 1937 there were four dailies, all of which bargained as a group with the Union until 1959 (G.C. Exh. 26-47).[1] One of the dailies ceased publication in 1959, and another went out of business in 1965, when the remaining two, The Chronicle and The Examiner, formed the Company.

The Company's circulation department maintains separate divisions for "City" and "Suburban" distribution.

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1. Exhibits in the record below are referred to by the designations "G.C." (General Counsel), "Union" and "Company", respectively. Reference to the Transcript of the Proceedings before the Board are designated "Tr."

Home delivery in the City area is handled by so-called District Managers, and distribution for City street sales is handled by Street Salesmen, both of which classifications are employees covered by the collective bargaining agreement between the Company and the Union (Tr. 1921, 1964, 1966; G.C. Exh. 2) Suburban distribution, which extends to outlying areas within a fifty mile radius of San Francisco, is handled on a mixed basis. Some of the distribution personnel in these areas are called wholesalers, and are employed by the Company covered by the agreement with the Union. Others are called Dealers, whom the Court below has determined to be independent contractors. Both groups perform identical functions. Newspapers are brought to the wholesalers or dealers as the case may be, by Company employed drivers who are covered by the Union agreement, and then are distributed to home subscribers, newsstands and vendors through adult carriers or carrier boys (Tr. 1976, 1977, 1980, 1982, 1821-1828, 1318, 1319). The work involved is also substantially identical with that performed by the District Managers in the City Division (Tr. 964, 1975).

The individual respondents in this case are Dealers, i.e., independent contractors who perform distribution work in the Suburban areas. The respondent Dealers filed the unfair labor practice charges which initiated this case before the Board, and have been active parties at all phases of the proceedings.

2. The Proceeding Before the Board and the Court Below

The charges filed with the Board alleged that a provision of the collective bargaining agreement between the Company and the Union, described more fully below, violates Section 8(e) of the Act because it requires the Company to terminate certain Dealer contracts. Following the issu-

ance of a complaint and a hearing, the Board concluded that the Dealers were employees rather that independent contractors, and accordingly that Section 8(e) did not apply to an agreement which affected their tenure with the Company, 194 NLRB No. 4 (1971). The complaint was thereupon dismissed. The respondent Dealers sought review of the Board's decision in the court below, which subsequently reversed the Board and held that the Dealers were independent contractors. 462 F.2d 699 (C.A. 9, 1972). The proceeding was remanded to the Board for determination of the Section 8(e) question, which the Board had not passed on in view of its holding that the Dealers were employees. Pursuant to the remand, the Board issued a Supplemental Decision and Order, finding that the disputed contract provision does not have a lawful primary work preservation object, and therefore violates Section 8(e) of the Act (Appendix "C", *infra.*). On review, the court below sustained the Board's decision (Appendix "A", *infra*). The present petition is limited to the Section 8(e) question; the Union does not request review of the determination that the Dealers are independent contractors.

3. The Disputed Contract Clause and Its History

The initial agreement between the Union and the Company's predecessors in 1937 covered distribution employees in both the San Francisco City and Suburban areas "within a radius of fifty (50) miles of San Francisco", but expressly excluded Dealers (G.C. Exh. 26, Sections 1 and 2). Then, as now, distribution in the outlying areas was carried on in part by employees and in part by Dealers, who in the original contract were described as working under "lease, unit system, ownership or route man systems" (*ibid.*). The provisions which made this distinction in contract coverage

have been carried forward without relevant change in the twenty contracts negotiated between the parties between 1947 and the 1968 agreement which is challenged in the present proceeding (G.C. Exh. 3, 26-51).

As early as 1938, however, the agreement between the parties recognized that the work performed by Dealers fell within the Union's "jurisdiction," and provided for a gradual extension of the agreement to such work if and when the newspaper publishers terminated the individual independent contracts with those particular individuals (G.C. Exh. 26). Thus, the Union claimed the right to have employees replace dealers as early as 1938, but the conversion of Dealer to employee was left to the publisher's decision.

In 1955, for the first time, the collective bargaining agreement contained a provision, substantially identical to the clause before the Court, which required the publishers to terminate dealerships in accordance with a time schedule and in specified areas, and thereafter to have the work performed by employees working under the Union agreement (G.C. Exh. 44, Section 1(b)). Each subsequent agreement up to and including the agreement involved in this case contained similar language and extended the area in which the publishers (the Company only, since 1965) were required to terminate dealerships and bring the work within the collective bargaining unit (G.C. Exhs. 45-50). As a result, by 1968 dealerships had been terminated and the work assigned to wholesalers in numerous suburban communities in Alameda, Contra Costa, San Mateo, Santa Clara and Marin Counties.[2] In most instances, the Dealer was offered

2. The expansion of the bargaining unit under these provisions of the agreements between 1955 and 1968 is shown in chart form in Appendix "E", *infra*.

employment as a wholesaler when his route was converted, and the same individual continued to perform the work under the collective bargaining agreement.

The full text of the contract clause which has been found in violation of Section 8(e) of the Act appears in Appendix "D", *infra*. In summary, the first paragraph of the clause describes the kind of work covered by the agreement, and specifies the City and Suburban areas "within a radius of fifty (50) miles of San Francisco," where the agreement has application. The second paragraph indentifies areas and provides dates upon which the dealerships in effect for such areas shall be terminated, and the work brought within the coverage of the agreement. It is also provided that the Company may offer the Dealer affected the right "to continue in that same territory as an employee working under Union jurisdiction."

The historical motivation of the Union in insisting upon the expansion of its bargaining unit into the outlying areas was its recognition of the fact "that the people are moving out of the metropolitan areas and moving into the suburban areas" (Tr. 1974, 1801). The Union was apprehensive that an increase in suburban population would increase job opportunities in those areas with a corresponding decrease in job opportunities in San Francisco proper.

The facts bear out the Union's premonitions. For instance, in 1938 the newspaper circulation in Marin County was only 600 as compared with the present 33,000 (Tr. 1865, C.P. 57). In 1940 approximately 400 Union members were employed by the newspapers in the bargaining unit (Tr. 1883). By 1946 the number of jobs had declined to about 260, primarily because of World War II (Tr. 1883). There was a gradual increase in employment in the bargaining unit and by 1950 there were about 500 jobs (Tr. 1918). The

current number of jobs in the bargaining unit is about equal to the number of jobs in 1965, because of the loss of city jobs and the increase in suburban jobs (Tr. 1913, 1915, 1916). There are presently about 500 wholesalers in the bargaining unit, the same as in 1950 (Tr. 1909, 1918, E.28). More than half the people working in the wholesaler classification under the jurisdiction of the Union are employed in the suburban areas (Tr. 1909, Co. Exh. 28).

4. The Decisions of the Board and the Court Below

The Board rejected the Union's contention that the disputed contract clause has a primary work preservation objective, which would concededly "insulate it from a Section 8(e) violation" (Appendix "C", *infra*). According to the Board, the gradual expansion of the bargaining unit for which the clause provided would "cover geographical areas never within the unit, where any increase in the amount of work done by the independent dealers would not itself cause any decrease in the amount of work available to unit employees." (*ibid.*). The Board was "persuaded that the provision for termination of the dealers' contracts is aimed principally at the non-union independent dealers, not at the primary employer," and that "the work preservation aspect of the contract terminations under attack . . . is incidental to the cessation of doing business instead of the other way around." (*ibid.*).

The discussion of the Section 8(e) question in the opinion of the court below is summary. The opinion states simply that "The Board correctly found that 'work preservation' was not the primary object of the contract termination provisions, and in so doing it properly applied the rule of *National Woodwork Manufacturers Assoc. v. N.L.R.B.*, 386 U.S. 612 (1957)." (Appendix "A", *infra*).

REASONS FOR GRANTING THE PETITION

1. This case presents an important question in the application of the principles of *National Woodwork Manufacturers Association v. National Labor Relations Board*, 386 U.S. 612 (1957), to the relationship between union, employer and individual independent contractors. In the cited case the Court affirmed the rule, which had largely been accepted in the courts of appeal, that Section 8(e) of the Act reflected the same distinction between lawful primary union activity and unlawful secondary activity which had developed under Section 8(b)(4) of the Act. *National Woodwork Manufacturers Association* presented a conventional situation in which two or more separate employers were involved, each with its own employees, and the union agreement was directed at securing job opportunities with the employer under contract with it, to the detriment of other employers. In the present case, the competition for jobs lies between employees covered by a collective bargaining agreement and individual independent contractors, called Dealers, who perform the same kind of work as that covered by the Union agreement. Job competition between these groups is not limited to the newspaper industry. See, for example, *Duie Pyle, Inc. v. N.L.R.B.*, 383 F.2d 772 (C.A.3, 1967), and this Court's decision in *Teamsters Local 24 v. Oliver*, 358 U.S. 283 (1959). The impact of Section 8(e) upon collective bargaining agreements which protect the interest of bargaining unit employees in this competition presents a question of widespread application which should be resolved by this Court.

2. The Board and the court below have erred in finding an absence of a lawful primary objective in the disputed clause in this case. Their application of the ruling in *National Woodwork Manufacturers Association v. National*

Labor Relations Board, supra, is wrong, and should not be permitted to stand.

(a) The bargaining unit expansion clause which has been held unlawful in this case is the current expression of more than twenty years of continuous recognition in the bargaining relationship between the Union and the Company that work performed by Dealers is in direct competition to and threatens the job security of employees in the bargaining unit. The work performed by the two groups is identical for all purpose relevant to Section 8(e) of the Act. The shift in population from metropolitan San Francisco to the suburban areas would have inevitably produced, absent contract protection, an ever increasing amount distribution work performed by Dealers, and a corresponding decrease in distribution work performed by bargaining unit employees. The practical question before the Union in 1938 was the same as in 1968, i.e., whether steps could be taken to protect job opportunities for bargaining unit employees in the face of population changes that would continuously shrink the amount of bargaining unit work available.

Contract clauses which reflect union claims for work which is essential to the protection of the bargaining unit have been recognized by courts of appeal not to infringe upon the area of unlawful secondary activity circumscribed by Section 8(e) of the Act. *Teamsters Local 710 v. N.L.R.B.* 335 F.2d 709 (C.A.D.C., 1964); *Canada Dry Corp. v. N.L.R.B.*, 421 F.2d 907 (C.A.6, 1970). Compare, *Retail Clerks Local 648 (Brentwood Markets),* 171 NLRB 1018 (1963); *Retail Clerks Local 775 (Associated Food Stores),* 186 NLRB 664 (1970); *Retail Clerks Local 648 (Cala Foods),* 173 NLRB 1711 (1968) As shown in these decisions, the circumstance that such agreements require a cessation

of business between the primary employer and other persons is not controlling under Section 8(e). In the present case, the function and purpose of the disputed clause was to protect the continued existence of job opportunities within the bargaining unit, and its impact upon the Dealers was no more than this primary objective required. A proper application of this Court's reasoning in *National Woodwork Manufacturers Association, supra,* legitimizes an agreement which serves this objective.

(b) The holding of the Board and the court below is inconsistent with the established decisional rule that Section 8(e) does not prohibit agreements which forbid all subcontracting, or agreements which allow subcontracting only to employers who pay the same labor costs as those required in the collective bargaining agreement. Such agreements are primary in nature because their purpose is to protect bargaining unit jobs by eliminating incentive to contract with other persons to perform bargaining unit work. *Orange Belt District Council of Painters No. 48 v. N.L.R.B.,* 328 F.2d 534 (C.A.D.C., 1964); *Teamsters Local 710 v. N.L.R.B.,* 335 F.2d 709 (C.A.D.C. 1964).

The effect of the disputed clause in the present case is to prohibit altogether dealership contracts (the subcontracting of work to Dealers), but to accomplish this ultimate goal on a gradual basis so as to avoid disruption of the Company's business requirements. The termination of dealerships is in no way conditional upon the labor policies of the Dealers. Regardless of how the Dealer may choose to operate his business, his dealership will be terminated. There is, accordingly, no "tactical object" in the disputed clause in this case to achieve union goals in other employment relationships. Rather, "the agreement or its mainten-

ance is addressed to the labor relations of the contracting employer *vis-a-vis* his own employees" *National Woodwork Manufacturers Association v. National Labor Relations Board*, 386 U.S. 612, 645 (1967).

(c) The Board states in its decision that "no substantial work opportunity would necessarily be added for employees from the pre-existing unit [upon termination of the dealerships], but rather there would be new employees who must become unit members" (Appendix "C", *infra*). This conclusion reflects a static concept of a bargaining unit which cannot accommodate to economic changes. If adopted as an approach to the interpretation of Section 8(e) it would effectively prevent unions from protecting unit work from inevitable changes which encroach on bargaining unit jobs. This notion was expressly rejected in *Teamsters Local 710 v. N.L.R.B.*, 335 F.2d 709 (C.A.D.C., 1964), and must be rejected here.

It is true that new employees are brought into the bargaining unit upon termination of a dealership, and indeed it is likely that the terminated Dealer will be given the opportunity to work as a member of the bargaining unit. This process, however, does not expand the volume of bargaining unit work. The history of the operation of the disputed clause shows that it has had the effect of merely maintaining the pre-existing size of the bargaining unit in the face of the increasing jobs in the suburban areas, and that but for the clause the bargaining unit jobs would have substantially diminished. There is nothing unlawful or secondary in a contract provision under which the bargaining unit merely holds its own against outside competition. Section 8(e) cannot properly be interpreted to prohibit this minimum effort to protect bargaining unit work.

CONCLUSION

For all of the foregoing reasons, it is respectfully requested that a writ of certiorari should issue to the Court of Appeals for the Ninth Circuit to review the judgment in this case.

May 16, 1975.

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Appendix A

United States Court of Appeals
for the Ninth Circuit

NEWSPAPER AND PERIODICAL DRIVERS & HELPERS UNION, LOCAL NO. 921, INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN & HELPERS OF AMERICA, *Petitioner,* vs. NATIONAL LABOR RELATIONS BOARD, *Respondent.*	No. 73-3595
DOUGLAS BROWN, WALTER DELONG, PHILLIP T. WALKER, MARVIN W. WEISSENSEE, KENNETH C. WOLLMAN, JOHN ROY CONWAY, LEROY LESTER HOLBROOK, DARRELL E. BAKER, WILLIS P. KOLB, *Cross-Petitioners,* vs. NATIONAL LABOR RELATIONS BOARD, *Respondent.*	No. 73-3596
NATIONAL LABOR RELATIONS BOARD, *Petitioner,* vs. SAN FRANCISCO NEWSPAPER PRINTING COMPANY, INC., *Respondent.*	No. 73-3597

OPINION

[December 23, 1974]

On Petition and Cross-Petition for Review
of Supplemental Decision and Order
of
National Labor Relations Board

Before: CHAMBERS and KILKENNY, Circuit Judges, and JAMESON, District Judge.*

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*The Honorable William J. Jameson, Senior District Judge for the District of Montana, sitting by designation.

PER CURIAM:

Before the court are the respective petitions of Newspaper & Periodical Drivers & Helpers Union, Local #921 (Union) and the nine charging parties, individuals who are non-unionized newspaper distributors (Dealers) for San Francisco Newspaper Printing Company, Inc. (Company), to review a supplemental decision and order of the National Labor Relations Board (Board) reported in 204 N.L.R.B. No. 60. The supplemental decision and order followed our remand of an earlier Board decision and order. *Brown v. N.L.R.B.*, 462 F.2d 699 (CA9 1972). The Board has filed a cross-application for enforcement of its supplemental order. The Union first sought review of the subject in the United States Court of Appeals for the District of Columbia Circuit, followed by the Dealers' request for review and change of venue. A change of venue was granted, and the consolidated cases were transferred to this court for further proceedings. A full statement of the facts is found in the Board's decision.

Our review convinces us that there is substantial evidence on the whole record to support the Board's findings that the Union and the Company violated § 8 (e) of the National Labor Relations Act (29 U.S.C. § 158 (e)) by agreeing to terminate the independent contractor status of Dealers who distributed the Company's newspapers and by permitting them to work, if at all, only as employees and Union members. The Board correctly found that "work preservation" was not the primary object of the contract termination provision, and in so doing it properly applied the rule of *National Woodwork Manufacturers Assoc. v. N.L.R.B.*, 386 U.S. 612 (1967).

Moreover, we hold that the Board, in the exercise of its expertise, properly refused to award compensatory damages or back pay to Dealers it ordered reinstated pursuant to § 10 (c) of the Act (29 U.S.C. § 160 (c)). When, and to what extent, damages may serve the policy of the National Labor Relations Act in a given case, is a complex problem for the Board to decide in the lights of its administrative experience and knowledge. The Board draws on a unique fund of expertise, and its choice of remedy must be given special respect by the reviewing courts. *Marriott Corp. v. N.L.R.B.*, 491 F.2d 367, 371 (CA9 1974). We see no abuse of the Board's discretion in its denial of compensation to Dealers, a group of independent contractors, not employees.

It is our considered judgment that the Board correctly applied 29 U.S.C. §§ 158 (e) and 160 (c) to the facts in the case and that its decision and order, reported as aforesaid, should be enforced. The petitions of Union and Dealers are denied.

The Board shall submit an appropriate order of enforcement.

IT IS SO ORDERED.

Appendix B

ORIGINAL

United States Court of Appeals
for the Ninth Circuit

NEWSPAPER AND PERIODICAL DRIVERS & HELPERS UNION, LOCAL No. 921, INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN & HELPERS OF AMERICA, *Petitioner,* vs. NATIONAL LABOR RELATIONS BOARD, *Respondent.*	No. 73-3595
DOUGLAS BROWN, WALTER DELONG, PHILLIP T. WALKER, MARVIN W. WEISSENSEE, KENNETH C. WOLLMAN, JOHN ROY CONWAY, LEROY LESTER HOLBROOK, DARRELL E. BAKER, WILLIS P. KOLB, *Cross-Petitioners,* vs. NATIONAL LABOR RELATIONS BOARD, *Respondent.*	No. 73-3596
NATIONAL LABOR RELATIONS BOARD, *Petitioner,* vs. SAN FRANCISCO NEWSPAPER PRINTING COMPANY, INC., *Respondent.*	No. 73-3597

JUDGMENT

Before: Chambers and Kilkenny, Circuit Judges, and Jameson, District Judge.*

*The Honorable William J. Jameson, Senior District Judge for the District of Montana, sitting by designation.

This cause came on to be heard upon a petition filed by Newspaper and Periodical Drivers & Helpers Union Local No. 921, International Brotherhood of Teamsters, Chauffeurs, Warehousemen & Helpers of America, and a cross-petition filed by Douglas Brown, et al., to review an order of the National Labor Relations Board issued against Newspaper and Periodical Drivers & Helpers Union, Local No. 921, International Brotherhood of Teamsters, Chauffeurs, Warehousemen & Helpers of America, its officers, agents, and representatives, and San Francisco Newspaper Printing Company, Inc., its officers, agents, successors, and assigns, on June 25, 1973, and upon a cross-application and application filed by the National Labor Relations Board to enforce said order. The Court heard argument of respective counsel on November 13, 1974, and has considered the briefs and transcript of record filed in this cause. On December 23, 1974, the Court being fully advised in the premises, handed down its decision denying the petitions to review and enforcing the Board's Order. In conformity therewith, it is hereby

ORDERED AND ADJUDGED by the Court that:

A. Petitioner Union, Newspaper & Periodical Drivers' & Helpers Union Local 921, International Brotherhood of Teamsters, Chauffeurs, Warehousemen & Helpers of America, its officers, agents, and representatives, shall:

1. Cease and desist from entering into, maintaining, giving effect to, or attempting to enforce the provisions of section 1(b) of the March 22, 1968, supplemental agreement between Petitioner Union and Respondent Employer, as modified in 1969, to the extent said provisions are found to be unlawful herein.

2. Take the following affirmative action designed to effectuate the policies of the National Labor Relations Act, hereinafter called the Act:

(a) Post at its business office and meeting halls copies of the attached notice marked "Appendix A." Copies of said notice, on forms provided by the Regional Director for Region 20, (San Francisco, California), after being duly signed by a representative of Petitioner Union, shall be posted by it immediately upon receipt thereof, and be maintained by it for 60 consecutive days thereafter, in conspicuous places, including all places where notices to members are customarily posted. Reasonable steps shall be taken by Petitioner Union to insure that said notices are not altered, defaced, or covered by any other material.

(b) Notify the aforesaid Regional Director, in writing, within 20 days from the date of this Judgment, what steps the Petitioner Union has taken to comply herewith.

B. Respondent Employer, San Francisco Newspaper Printing Co., Inc., San Francisco, California, its officers, agents, successors, and assigns, shall:

1. Cease and desist from entering into, maintaining, giving effect to, or attempting to enforce the provisions of section 1(b) of the March 22, 1968, supplemental agreement between Petitioner Union and Respondent Employer, as modified in 1969, to the extent said provisions are found to be unlawful herein.

2. Take the following affirmative action designed to effectuate the policies of the Act:

(a) Offer to any of the independent contractors, whose dealership contracts were terminated pursuant to the unlawful provisions of the supplemental agreement any time since 6 months before charges were filed in the instant proceeding, reinstatement of their dealership contracts.

(b) Post at its places of business copies of the attached notice marked "Appendix B." Copies of said notice, on forms provided by the Regional Director for Region 20,

after being duly signed by a representative of Respondent Employer, shall be posted by it immediately upon receipt thereof, and be maintained by it for 60 consecutive days thereafter, in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by Respondent Employer to insure that said notices are not altered, defaced, or covered by any other material.

(c) Notify the aforesaid Regional Director, in writing, within 20 days from the date of this Judgment, what steps the Respondent Employer has taken to comply herewith. Costs in favor of the Board.

COSTS: N.L.R.B. Brief	$212.00
Total	$212.00

Enforced, Judgment Filed and Entered
/s/ EMIL E. MELFI
Emil E. Melfi
Clerk
A True Copy,
Attest: Feb. 18, 1975
Emil E. Melfi
Clerk
by: /s/ SUSAN A. WHITE
Susan A. White, Deputy

Filed—Feb 18 1975
Clerk U. S. Court of Appeals

So Ordered:
/s/ RICHARD W. CHAMBERS
/s/ JAMES F. KILKENNY
as *Circuit Judges*
/s/ WILLIAM J. JAMESON
N.A.-District Judge

D-7268

APPENDIX A

NOTICE TO MEMBERS

Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board An Agency of the United States Government

WE WILL NOT enter into, maintain, give effect to, or attempt to enforce any agreement with San Francisco Newspaper Printing Co., Inc., requiring the termination of its contracts with dealers who are independent contractors and having such dealers retained, if at all, as employees subject to our collective-bargaining agreement with that employer.

Newspaper & Periodical Drivers' & Helpers Union Local 921, International Brotherhood of Teamsters, Chauffeurs, Warehousemen & Helpers of America
(Labor Organization)

Dated ..... By .....
(Representative) (Title)

This is an official notice and must not be defaced by anyone.

This notice must remain posted for 60 consecutive days from the date of posting and must not be altered, defaced, or covered by any other material.

Any questions concerning this notice or compliance with its provisions may be directed to the Board's Office, 13018 Federal Building, Box 36047, 450 Golden Gate Avenue, San Francisco, California 94102, Telephone 415-556-3197.

APPENDIX B

NOTICE TO EMPLOYEES

Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board An Agency of the United States Government

WE WILL NOT enter into, maintain, give effect to, or attempt to enforce any agreement requiring the contracts of dealers who are independent contractors to be terminated and the dealers retained, if at all, as employees subject to our colective-bargaining agreement with Newspaper & Periodical Drivers' & Helpers Union Local 921.

WE WILL offer to any of the dealers, whose contract terminations have been found unlawful, reinstatement of their dealership contracts.

San Francisco Newspaper
Printing Co., Inc.
(Employer)

Dated ..... By .....
(Representative) (Title)

This is an official notice and must not be defaced by anyone.

This notice must remain posted for 60 consecutive days from the date of posting and must not be altered, defaced, or covered by any other material.

Any questions concerning this notice or compliance with its provisions may be directed to the Board's Office, 13018 Federal Building, Box 36047, 450 Golden Gate Avenue, San Francisco, California 94102, Telephone 415-556-3197.

Appendix C

FKP

204 NLRB No. 60

D-7268
San Francisco, Calif.

United States of America
Before the National Labor Relations Board

Newspaper & Periodical Drivers' &
Helpers Union Local 921, International
Brotherhood of Teamsters, Chauffeurs,
Warehousemen & Helpers of America

and

San Francisco Newspaper Printing
Co., Inc.

and

Douglas Brown, an Individual	Case 20-CE-68
Walter De Long, an Individual	Case 20-CE-69
Phillip T. Walker, an Individual	Case 20-CE-70
Marvin W. Weissensee, an Individual	Case 20-CE-71
Kenneth C. Wollman, an Individual	Case 20-CE-72
John Roy Conway, an Individual	Case 20-CE-73
Leroy Lester Holbrook, an Individual	Case 20-CE-74
Darrell E. Baker, an Individual	Case 20-CE-76
Willis P. Kolb, an Individual	Case 20-CE-77

SUPPLEMENTAL DECISION AND ORDER

On November 8, 1971, the National Labor Relations Board issued a Decision and Order dismissing the complaint in the above-entitled proceeding, upon concluding that certain newspaper dealers, with whom it had been alleged the Respondent Employer had agreed to cease doing business, were employees of Respondent Employer and that therefore the relationship between the Employer and the dealers

was not controlled by Section 8(e) of the Act.[1] By so hold-

1. 194 NLRB No. 4.

ing, the Board found it unnecessary to determine whether, assuming the dealers were not employees of Respondent Employer, the effectuation of an agreement requiring Respondent Employer to terminate its contracts with the dealers constituted a violation of Section 8(e).[2] Thereafter, the Charging Parties petitioned the United States Court of Appeals for the Ninth Circuit to review the Board's Order.

On June 12, 1972, the court issued its decision, finding that the Board erred in concluding that the newspaper dealers were employees, finding instead that they were independent contractors and remanding the case to the Board to determine whether in light of the court's finding a violation of Section 8(e) had occurred.[3] On November 13, 1972, the Supreme Court of the United States denied a petition for writ of certiorari. Thereafter, the Board invited statements of position from the parties in light of the remand order. Such statements were received from the Charging Parties and Respondent Union.

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, as amended, the National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

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2. No issue has been raised as to the timeliness of the filing of the charges with respect to the limitation contained in Sec. 10(b) of the Act. The initial execution of the agreement in question between Respondent Employer and Respondent Union took place more than 6 months prior to the date the instant charges were filed and is therefore immune from attack in this proceeding. The implementation of the agreement within the 6-month period, with which we are here concerned, however, is not so immune. *Drivers, Salesmen, Warehousemen, Milk Processors, Cannery, Dairy Employees and Helpers Local Union No. 695, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America (John B. Threlfall d/b/a Threlfall Construction Company)*, 152 NLRB 577, 580; *Milk Drivers and Dairy Employees, Local Union No. 537 (Sealtest Foods, A Division of National Dairy Products Corporation)*, 147 NLRB 230, 231.

3. 462 F.2d 699.

The Board has again reviewed the entire record in light of the exceptions to the Trial Examiner's Decision, the briefs and statements of position, and the court's decision and makes the following additional findings and conclusions:[4]

As set forth more fully in the Trial Examiner's Decision attached to the Board's earlier Decision and Order, the Respondent Employer, a Newspaper publisher, distributes its newspapers throughout the Oakland-San Francisco metropolitan area. The distribution area is divided into "territories" and within each territory a person in charge of circulation hires or contracts with individual carriers (adults and boys) who make the actual home deliveries to subscribers. The persons in charge of the territories, or their carriers, also deliver to newspaper stands on the streets. Over the years, Respondent Employer has had successive collective-bargaining agreements with Respondent Union, covering the persons in charge of those territories lying within the geographical jurisdiction specified in the agreements. [This geographical jurisdiction increased gradually] until, under the agreement in effect when the instant charges were filed, it included the terri-

4. The court stated in its opinion: "We reverse and remand for a hearing on the merits." By this we take the court to mean that we are to determine, now that the dealers are to be viewed as independent contractors, whether Sec. 8(e) is violated by the application to them of the agreement before us. Since this issue was fully litigated we do not think the court intended to direct us to reopen the record for the taking of additional evidence and we are satisfied that the case is ripe for decision on the merits upon the existing record.

Member Kennedy, who dissented to the original Decision and Order herein, agrees that a remand to the Administrative Law Judge for preparation of a decision on the merits is unnecessary. There are no substantial credibility resolutions posed by the record herein and he agrees that the Board can now consider the case on its merits.

tories of the Charging Parties herein, who are some of the "dealers" found by the court in this case to be independent contractors. Prior to the agreement, the Union had attempted, unsuccessfully, to organize the dealers. Under the terms of the agreement, those dealers whose territories lie within the Union's expanded geographical jurisdiction would have their dealership contracts terminated according to a prescribed time schedule and would continue to function, if at all, as unit employees subject to the collective-bargaining agreement and its union-security clause. Whether they continued at all would be by mutual agreement between the Employer and themselves.

Pursuant to the agreement, the contracts of dealers Chain and Holbrook were terminated within the 6-month period prior to the filing of the instant charges. Further terminations pursuant to the collective-bargaining agreement were announced, but their implementation was restrained by court orders.

Unless justified by some legitimate primary objective, the provision requiring the termination of the independent contractor status of the dealers, allowing them to continue their work only as employees and union members, presumptively violates Section 8(e).[5] Thus, unless the contract terminations, which are in effect cessations of business, are merely incidental to the accomplishment of an objective relating principally to the terms and conditions of employment of employees in the bargaining unit, their thrust

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5. *General Teamsters, Chauffeurs, Warehousemen and Helpers, Local 982, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America (Associated Independent Owner-Operators, Inc.)*, 181 NLRB 515, 520-521, 529; *Milk Drivers and Dairy Employees, Local Union No. 537, supra*, 147 NLRB at 235-236.

is secondary and therefore prohibited by the Act.[6] Under the facts of this case, the issue remaining at this juncture is, as stated but never reached by the Administrative Law Judge,[7] whether the termination provision "has a primary work preservation objective so as to insulate it from a Section 8(e) violation."[8]

[The Union's claim of "work preservation" is based on the assertion that the job opportunities have been diminishing in the geographical area that was within its jurisdiction prior to the current collective-bargaining agreement.] In the Union's view, the shifting of the newspaper circulation away from the city and into suburban areas not previously within the Union's jurisdiction, has necessitated the Union's increasing its geographical jurisdiction in the suburbs in order to hold on to the work traditionally performed by unit employees.

In our view, however, the work preservation aspect of the contract terminations under attack here is incidental to the cessation of doing business instead of the other way around. Respondents assert that placing the work of the dealers under the substantive provisions of the collective-bargaining agreement will create more jobs.[9] But the agreement

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6. Cf. *Highway Truck Drivers and Helpers, Local 107, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America (S & E McCormick, Inc.)*, 159 NLRB 84, 101, reversed *sub nom. A. Duie Pyle, Inc. v. N.L.R.B.*, 383 F.2d 772 (C.A. 3, 1967), cert. denied 390 U.S. 905, Supplemental Decision and Order reported in 199 NLRB No. 63 (cited *infra* as *McCormick*).

7. The title of "Trial Examiner" was changed to "Administrative Law Judge" effective August 19, 1972.

8. 194 NLRB No. 4, p. 7 (TXD).

9. Dealers who now work up to 7 days a week would henceforth work only 5.

does not require that the work of the dealers be given to employees from the preexisting unit. It permits retention of the former independent dealers to continue distributing newspapers and it is reasonable to expect that many of the dealers would be so retained. Thus, no substantial work opportunities would necessarily be added for employees from the preexisting unit, but rather there would be new employees who must become union members.[10] Furthermore, the unit would be expanded to cover geographical areas never within the unit, where any increase in the amount of work done by the independent dealers would not in itself cause any decrease in the amount of work available to unit employees.[11] No claim is made here that changing dealers into unit employees is necessary to preserve union standards within the unit or to discourage contracting of unit work.[12]

Noting also that the Union's president admitted that, after failing in attempts to organize the dealers, the Union "decided to do it by contract, by collective bargaining," we are persuaded that the provision for termination of the dealers' contracts is aimed principally at the nonunion independent dealers, not at the primary employer. The provision, as implemented, therefore, is secondary and unlawful under Section 8(e).

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10. Cf. *Meat and Highway Drivers, Dockmen, Helpers and Miscellaneous Truck Terminal Employees, Local Union No. 710, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America (Wilson & Co.) v. N.L.R.B.*, 335 F.2d 709 (C.A.D.C., 1964). Without deciding what weight it is entitled to, we also note that in *Wilson*, unlike the instant case, the primary employers had, by moving their operations, caused the loss of the work the union was seeking to recapture through the agreement in question.

11. Cf. *McCormick*, *supra*, 159 NLRB at 98.

12. *Id.* at 100.

The Remedy

We shall order Respondents to cease and desist from any effectuation of the agreement to terminate nonunion dealers who are independent contractors and to post appropriate notices to that effect. In addition, since certain dealers were actually terminated pursuant to the agreement, we shall order that Respondent Employer offer to reinstate their dealership contracts. In the circumstances of this case we think such action will adequately effectuate the purposes of the Act.

ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board hereby orders that:

A. Respondent Union, Newspaper & Periodical Drivers' & Helpers Union Local 921, International Brotherhood of Teamsters, Chauffeurs, Warehousemen & Helpers of America, its officers, agents, and representatives, shall:

1. Cease and desist from entering into, maintaining, giving effect to, or attempting to enforce the provisions of section 1(b) of the March 22, 1968, supplemental agreement between Respondent Union and Respondent Employer, as modified in 1969, to the extent said provisions are found to be unlawful herein.

2. Take the following affirmative action designed to effectuate the policies of the Act:

(a) Post at its business office and meeting halls copies of the attached notice marked "Appendix A."[13] Copies of

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13. In the event that this Order is enforced by a Judgment of a United States Court of Appeals, the words in the notice reading "POSTED BY ORDER OF THE NATIONAL LABOR RELATIONS BOARD" shall read "POSTED PURSUANT TO A JUDGMENT OF THE UNITED STATES COURT OF APPEALS ENFORCING AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD."

said notice, on forms provided by the Regional Director for Region 20, after being duly signed by a representative of Respondent Union, shall be posted by it immediately upon receipt thereof, and be maintained by it for 60 consecutive days thereafter, in conspicuous places, including all places where notices to members are customarily posted. Reasonable steps shall be taken by Respondent Union to insure that said notices are not altered, defaced, or covered by any other material.

(b) Notify the Regional Director for Region 20, in writing, within 20 days from the date of this Order, what steps the Respondent Union has taken to comply herewith.

B. Respondent Employer, San Francisco Newspaper Printing Co., Inc., San Francisco, California, its officers, agents, successors, and assigns, shall:

1. Cease and desist from entering into, maintaining, giving effect to, or attempting to enforce the provisions of section 1(b) of the March 22, 1968, supplemental agreement between Respondent Union and Respondent Employer, as modified in 1969, to the extent said provisions are found to be unlawful herein.

2. Take the following affirmative action designed to effectuate the policies of the Act:

(a) Offer to any of the independent contractors, whose dealership contracts were terminated pursuant to the unlawful provisions of the supplemental agreement any time since 6 months before charges were filed in the instant proceeding, reinstatement of their dealership contracts.

(b) Post at its places of business copies of the attached notice marked "Appendix B."[14] Copies of said notice, on forms provided by the Regional Director for Region 20, after being duly signed by a representative of Respondent

14. See fn. 13.

Employer, shall be posted by it immediately upon receipt thereof, and be maintained by it for 60 consecutive days thereafter, in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by Respondent Employer to insure that said notices are not altered, defaced, or covered by any other material.

(c) Notify the Regional Director for Region 20, in writing, within 20 days from the date of this Order, what steps the Respondent Employer has taken to comply herewith.

Dated, Washington, D.C. Jun 25 1973

(Seal)

.....
Edward B. Miller, Chairman

.....
Ralph E. Kennedy, Member

.....
John A. Penello, Member
NATIONAL LABOR RELATIONS BOARD

APPENDIX A

NOTICE TO MEMBERS

Posted by Order of the
National Labor Relations Board
An Agency of the United States Government

WE WILL NOT enter into, maintain, give effect to, or attempt to enforce any agreement with San Francisco Newspaper Printing Co., Inc., requiring the termination of its contracts with dealers who are independent contractors and having such dealers retained, if at all, as employees subject to our collective-bargaining agreement with that employer.

Newspaper & Periodical Drivers' & Helpers Union Local 921, International Brotherhood of Teamsters, Chauffeurs, Warehousemen & Helpers of America
(Labor Organization)

Dated ..... By .....
(Representative) (Title)

This is an official notice and must not be defaced by anyone.

This notice must remain posted for 60 consecutive days from the date of posting and must not be altered, defaced, or covered by any other material.

Any questions concerning this notice or compliance with its provisions may be directed to the Board's Office, 13018 Federal Building, Box 36047, 450 Golden Gate Avenue, San Francisco, California 94102, Telephone 415-556-3197

APPENDIX B

NOTICE TO EMPLOYEES

Posted by Order of the
National Labor Relations Board
An Agency of the United States Government

WE WILL NOT enter into, maintain, give effect to, or attempt to enforce any agreement requiring the contracts of dealers who are independent contractors to be terminated and the dealers retained, if at all, as employees subject to our collective-bargaining agreement with Newspaper & Periodical Drivers' & Helpers Union Local 921.

WE WILL offer to any of the dealers, whose contract terminations have been found unlawful, reinstatement of their dealership contracts.

San Francisco Newspaper
Printing Co., Inc.
(Employer)

Dated ..... By .....
(Representative) (Title)

This is an official notice and must not be defaced by anyone.

This notice must remain posted for 60 consecutive days from the date of posting and must not be altered, defaced, or covered by any other material.

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Appendix D

THE ALLEGED UNLAWFUL CLAUSE OF THE 1968 AGREEMENT

Section 1.

(a) This Agreement, except as hereinafter otherwise provided, applies to all employees employed within the cities of San Francisco, South San Francisco, San Bruno, Millbrae, Burlingame, San Mateo, Foster City, Oakland, Berkeley, Alameda, Albany, El Cerrito, San Leandro, Belmont, San Carlos, Pacifica, Castro Valley, San Lorenzo, Redwood City, Atherton, Menlo Park, and Hayward—including roadmen operating within a radius of fifty (50) miles of San Francisco—whose work is to promote the sale of, distribution of and the collection for the Employers' product through the medium of carrier boys, news boys, news vendors and news stands, including those full time employees performing dispatching. Provided, nothing herein contained shall be construed to interfere with part time dispatchers as now employed.

• • •

(b) It is agreed that Section 1 (a) be subject to modification in accordance with the following terms:

(1) The Union's jurisdiction shall be extended to include:

Morning Newspaper	Effective Date	Afternoon Newspaper
East Menlo Park		
East Palo Alto	4-1-68	
Palo Alto	7-1-68	
South Palo Alto	10-1-68	
Mountain View		
W. Mountain View	1-1-69	
Moffett Field		
Baron Park	4-1-69	
Los Altos		
No. Sunnyvale	7-1-69	
Sunnyvale	9-1-69	Sunnyvale
Santa Clara	1-1-70	Santa Clara
Cupertino	3-1-70	
W. San Jose	7-1-70	W. San Jose
Campbell	10-1-70	Santa Clara Streets
Monte Vista	1-1-71	
Central San Jose		
Corte Madera	3-1-71	Central San Jose
Almaden		
Kentfield	7-1-71	San Jose Streets
East San Jose*		
Foothills*		
San Anselmo	9-1-71	
(*Milpitas and E. San Jose hills excluded)		
Fairfax		
San Rafael	1-1-72	
East San Rafael	4-1-72	
South San Rafael	7-1-72	

(2) The dealer in any one or all of the above designated cities whose contract is terminated in accordance with the above terms shall, at the Employer's option, be permitted to continue in that same territory as an employee working under Union jurisdiction and so long as he remains continuously employed in the same territory shall not be subject to replacement in accordance with the seniority provisions of Section 26 but in all other respects shall be subject to the terms of this Agreement.

Appendix E

The communities in which the Union extended its jurisdiction with respect to wholesalers in chronological order, prior to the alleged unlawful agreement.

South San Francisco	1956	(GC 44)
San Leandro	1957	(GC 44)
Albany	1958	(GC 44)
El Cerrito	1958	(GC 44)
San Bruno	1960	(GC 48)
Millbrae	1960-61	(GC 48, 49)
Burlingame	1960-61	(GC 48, 49)
San Mateo (City)	1962	(GC 49)
Foster City	1962	(GC 49)
San Carlos	1966	(GC 50)
Belmont	1966-68	(GC 2)
Pacifica	1966-68	(GC 2)
Castro Valley	1966-68	(GC 2)
San Lorenzo	1966-68	(GC 2)
Redwood City	1967	(GC 2)
Atherton	1967	(GC 2)
Menlo Park	1968	(GC 2)
East Palo Alto	1968	(GC 2)
Palo Alto	1968	(GC 2)
Palo Alto	1968	(GC 2)
Southern Palo Alto	1968	(GC 2)
Mountain View	1969	(GC 2)
Moffett Field	1969	(GC 2)
Baron Park	1969	(GC 2)
Los Altos	1969	(GC 2)

In the Supreme Court

OF THE

United States

JUN 18 19

MICHAEL RODAK, JR.

OCTOBER TERM, 1974

No. 74-1453

NEWSPAPER AND PERIODICAL DRIVERS & HELPERS UNION, LOCAL 921, INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN & HELPERS OF AMERICA,
Petitioner,

vs.

NATIONAL LABOR RELATIONS BOARD,
Respondent,

and

SAN FRANCISCO NEWSPAPER PRINTING CO. INC.,
Respondent,

and

DOUGLAS BROWN, WALTER DELONG, PHILIP T. WALKER, MARVIN W. WEISSENSEE, KENNETH C. WOLLMAN, JOHN ROY CONWAY, LEROY LESTER HOLBROOK, DARRELL E. BAKER, and WILLIS P. KOLB,
Respondents.

BRIEF OF THE INDIVIDUAL RESPONDENTS IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI to the United States Court of Appeals for the Ninth Circuit

TIMOTHY H. FINE,
G. JOSEPH BERTAIN, JR.,
50 California Street, Suite 955,
San Francisco, California 94111,
Attorneys for the Individual Respondents.

PERNAU-WALSH PRINTING CO. - 562 MISSION STREET - SAN FRANCISCO, CA 94105

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In the Supreme Court
OF THE
United States

OCTOBER TERM, 1974

No. 74-1453

NEWSPAPER AND PERIODICAL DRIVERS & HELPERS UNION, LOCAL 921, INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN & HELPERS OF AMERICA,
Petitioner,

vs.

NATIONAL LABOR RELATIONS BOARD,
Respondent,

and

SAN FRANCISCO NEWSPAPER PRINTING CO. INC.,
Respondent,

and

DOUGLAS BROWN, WALTER DELONG, PHILIP T. WALKER, MARVIN W. WEISSENSEE, KENNETH C. WOLLMAN, JOHN ROY CONWAY, LEROY LESTER HOLBROOK, DARRELL E. BAKER, and WILLIS P. KOLB,
Respondents.

BRIEF OF THE INDIVIDUAL RESPONDENTS IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI to the United States Court of Appeals for the Ninth Circuit

QUESTION PRESENTED

Whether the Court of Appeals correctly held there was substantial evidence on the whole record to support the Board's finding that the provision of the

March 1968 supplemental collective bargaining agreement between the Company and Union requiring termination of the Company's contracts with dealers who are independent contractors and retaining such individuals, if at all, only as employees subject to the Union's jurisdiction, was aimed principally at the non-union dealers, not at the Company, and, therefore, secondary and unlawful under Section 8(e) of the National Labor Relations Act, 29 U.S.C. §158(e)?

STATEMENT OF THE CASE

(A) The Proceedings to Date

Respondents Brown, DeLong, Walker, Weissensee and Wollman filed unfair labor practice charges with the respondent National Labor Relations Board ("Board") on March 27, 1970 contending that their prospective termination as independent newspaper dealers, pursuant to Section 1(b) of the March 22, 1968 Supplemental Agreement by and between respondent San Francisco Newspaper Printing Company, Inc. ("Company") and petitioner Newspaper and Periodical Drivers' & Helpers' Union, Local No. 921, International Brotherhood of Teamsters, Chauffeurs, Warehousemen & Helpers of America ("Union") violated Section 8(e) of the National Labor Relations Act, 29 U.S.C. Section 158(e) ("Act").[1]

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[1]The transcript of record is in five volumes. Volume 1 is the Clerk's Transcript, referred to as "CT." Volumes 2 and 3 are the Reporter's Transcript, referred to as "RT." Volumes 4 and 5 are the exhibits. "GC Ex." refers to the General Counsel's exhibit. "PU Ex." refers to the petitioner Union's exhibit. "RC Ex." refers to the respondent Company's exhibit. "CP Ex." refers to the charging parties' exhibit (the individual respondents herein).

Identical unfair labor practice charges were filed by respondents Conway and Holbrook on June 4, 1970 and by respondents Baker and Kolb on August 24, 1970. CT 5-53, 65-75.

After a five months investigation the Board issued a consolidated complaint on August 19, 1970, amended on September 24, 1970, against the Company and the Union alleging that they violated Section 8(e) of the Act by entering into, reaffirming, maintaining, and giving effect to an agreement requiring the Company to cease doing business with the individual respondents and other similarly situated newspaper dealers. CT 54-62, 81-83.

On September 18, 1970 the United States District Court for the Northern District of California, upon application of the Board, issued a temporary injunction, pursuant to Section 10(1) of the Act, 29 U.S.C. Section 160(1), enjoining, pending the disposition of the unfair labor practice charges before the Board, the Company and the Union from reaffirming, invoking, implementing or enforcing Section 1(b) of the March 22, 1968 Supplemental Agreement insofar as it required the Company to cease doing business with its newspaper dealers.

On November 18, 23, 24, 25, 27, 1970 and on December 9, 10, 11, 14, 15, 16, 17, 18, 1970, a hearing was held before the Hon. Herman Corenman, Administrative Law Judge, on the consolidated complaint, as amended. At this hearing seventeen witnesses testified producing some 2051 pages of hearing transcript and 151 exhibits were marked and identified.

On April 27, 1971, the Administrative Law Judge rendered his decision. He concluded that the newspaper dealers whom the Company and the Union have designated for termination on specified dates are employees and not independent contractors within the meaning of Section 2(3) of the Act. As a result of this conclusion he held that the March 22, 1968 Supplemental Agreement by and between the Company and the Union was not an agreement "to cease doing business with any other person" within the meaning of Section 8(e) of the Act. The Administrative Law Judge recommended to the Board that it issue an order dismissing the complaint in its entirety. CT 124-151.

The Administrative Law Judge refrained from ruling on the other issue before him, to wit: If the newspaper dealers are found to be independent contractors, whether Section 1(b) of the March 22, 1968 Supplemental Agreement has a primary work preservation objective so as to insulate it from a Section 8(e) violation. CT 130.

Both the General Counsel to the Board and the individual respondents took exception to the Administrative Law Judge's decision. CT 152-192, 197-207. The Company took limited exception to the decision. CT 193-196.

On November 8, 1971, the Board, Member Ralph E. Kennedy dissenting, issued its decision and order adopting the findings, conclusions and recommendations of the Administrative Law Judge and dismissing the complaint against the Company and the Union.

194 NLRB 37; CT 208-215. On November 9, 1971, the individual respondents filed with the United States Court of Appeals for the Ninth Circuit their petition to review the Board's decision and order. On November 30, 1971 the United States District Court dissolved the temporary injunction which it had previously made on September 18, 1970.

Following the dissolution of the temporary injunction the Company proceeded to put into effect its agreement with the Union to terminate various newspaper dealers as well as to take portions of the territory of other dealers.

On January 3, 1972, the individual respondents filed with the Court of Appeals their motion to expedite the review of the decision and order of the Board, for a stay of the Board's order and for a restraining order enjoining the Company from reaffirming, invoking, implementing or enforcing any agreement, contract or understanding it has with the Union insofar as it requires the Company to cease doing business with the individual respondents and other similarly situated newspaper dealers pending review by the Court of Appeals. By its orders of January 6, 1972, January 10, 1972, and January 24, 1972 the Court of Appeals expedited the review, stayed the Board's order pending review and issued and continued the requested restraining order to March 8, 1972, or until further order of the Court.

On June 12, 1972, the Court of Appeals issued its decision and order, finding that the Board erred in concluding that the newspaper dealers were employees

and finding instead that they were independent contractors. The Court of Appeals remanded the case to the Board to determine whether a violation of Section 8(e) of the Act, 29 U.S.C. Section 158(e) had occurred. *Brown v. NLRB,* 462 F.2d 699 (9th Cir. 1972). A joint petition for a Writ of Certiorari was filed by the Company and by the Union and denied by this Court on November 13, 1972. 409 U.S. 1008.

Upon remand the Board issued a Supplementary Decision and Order holding that the provision of the collective bargaining agreement requiring the termination of the independent contractor status of the dealers did not have a primary work preservation objective so as to insulate it from a Section 8(e) violation, but that "the provision for termination of the dealers' contacts is aimed principally at the nonunion independent dealers, not at the primary employer" and "therefore, is secondary and unlawful under Section 8(e)." 204 NLRB No. 60; CT 6.

The Board ordered the Company and the Union to cease and desist from entering into, maintaining, giving effect to, or attempting to enforce the provisions of Section 1(b) of the March 22, 1968 supplemental agreement between the Company and Union to the extent said provisions were found to be unlawful. The Board also ordered the Company to "offer to any of the independent contractors, whose dealership contracts were terminated pursuant to the unlawful provisions of the supplemental agreement any time since 6 months before charges were filed in the instant proceeding, reinstatement of their dealership contracts." 204 NLRB No. 60; CT 7-8.

On or about July 20, 1973 the Union filed a petition for review of the Board's Supplementary Decision and Order with the United States Court of Appeals for the District of Columbia. The individual respondents subsequently filed on August 17, 1973 a cross-petition to review the Board's Supplementary Decision and Order.[2] The Board thereafter filed against the Company an application for enforcement of its order and a motion consolidating all three cases. That motion was granted.

On October 19, 1973 the individual respondents moved the United States Court of Appeals for the District of Columbia for a change of venue and transfer of all three cases to the United States Court of Appeals for the Ninth Circuit. That motion was granted.

On or about March 29, 1974, the Board moved pursuant to Section 10(e) of the Act for temporary relief to provide for the reinstatement of the dealership contracts of former dealers Leroy Holbrook and Wray Chain, pending final order of the Court. That motion was granted.

On December 23, 1974, the Court of Appeals denied the petitions of the Union and the individual respondents and granted the application of the Board for enforcement of its order. 509 F.2d 99 (9th Cir. 1974). The Court of Appeals held that there was substantial evidence on the whole record to support

[2]The cross-petition of the individual respondents sought review of that portion of the Board's Supplementary Decision and Order which denied compensatory damages or back pay to dealers who had been terminated under the collective bargaining agreements.

the Board's finding of a Section 8(e) violation. Judgment was entered by the Court of Appeals on February 18, 1975.

(B) The Facts Relevant to the Issue Presented

At the time of the hearing before the Administrative Law Judge the Union represented 615 persons employed by the Company. Of these 615, 106 were employed as highway drivers, local drivers and new drivers Classifications II, III and IV under the collective bargaining agreement. Their function was to deliver the newspapers from the printing plant to transfer points and to dealers such as the individual respondents. These drivers would drive as far as the Oregon border, Nevada and Bakersfield to deliver the newspapers. Six of the 615 were employed as rack repairmen. The remaining 503 employees were employed as wholesalers Classification I under the collective bargaining agreement. Their function was to engage in the promotion, distribution, delivery, sale and collection of the Company's products through carrier boys, sales boys, news vendors, news stands and/or other outlets. RC Ex. No. 28; GC Exs. Nos. 2, 3; RT 1513, 1824.

The Union presently represents wholesalers engaged in the distribution of the San Francisco Chronicle and Examiner newspapers in the following geographical areas: City and County of San Francisco; Oakland, Berkeley, Albany, San Leandro, Hayward, Castro Valley and the northern portion of Alameda County; San Mateo County except for Hillsborough and Woodside; the portion of Santa Clara County from Palo

Alto and Mountain View to and including parts of San Jose except for Los Altos Hills and Stanford. The Union also represents wholesalers engaged in the distribution of the San Francisco Examiner in the southern portion of Marin County from the San Rafael hills to the Golden Gate. In all other areas the San Francisco Chronicle and Examiner newspapers are distributed through independent newspaper dealers under contract with the Company. RT 1506-07.

From the time it first represented wholesalers engaged in the distribution of the Chronicle and Examiner newspapers until the making of the December 2, 1955 collective bargaining agreement (GC Ex. No. 44) the cities of San Francisco, Oakland, Berkeley and Alameda were the areas where the Chronicle and Examiner were distributed through persons (termed "wholesalers") represented by the Union. GC Exs. Nos. 26 through 43.

Prior to the making of the December 21, 1955 collective bargaining agreement the Union made a number of efforts to organize and represent the newspaper dealers. RT 1971. Since the making of the December 21, 1955 collective bargaining agreement the Union has made no efforts to organize and represent the newspaper dealers because it has been able to extend its geographical jurisdiction through collective bargaining agreements. RT 1895-96.

The December 2, 1955 collective bargaining agreement represented the first contract between the Union and the Company providing for the termination of newspaper dealers and their replacement by employ-

ees working under the jurisdiction of the Union. GC Ex. No. 44. This agreement extended the jurisdiction of the Union to the cities of South San Francisco, San Leandro, Albany and El Cerrito on various specified date. GC Ex. No. 44.

Since the making of the December 21, 1955 collective bargaining agreement, the Union has extended its jurisdiction to its present boundaries as heretofore described through the termination of newspaper dealers and their replacement by employees working under its jurisdiction. This has been accomplished solely through the means of collective bargaining agreements. GC Exs. Nos. 45-50, 2, 3.

The membership of the Union employed by the various San Francisco newspapers in early 1940 was 300 or 320; in 1946 it was 260 to 280; and in the later part of the 1940s it was better than 400. RT 1883. Despite the elimination of two major San Francisco newspapers in the last twenty years (The News and The Call-Bulletin), the Union had increased its membership to 615 at the time of the hearing. RC Ex. No. 28.

In each of the areas that the Union extended its jurisdiction, the Chronicle and Examiner had always been distributed through independent newspaper dealers and not through employees. RT 1307-1375.

The elimination of newspaper dealers and their replacement by employees working under the jurisdiction of the Union increased the number of persons required to distribute the newspapers in the former dealer's territory. RT 1464, 1550-51, 1877.

The Union and the Company have an agreement that in areas where employees working under the Union's jurisdiction distribute the newspapers, adult carriers or drivers will not be used to provide the actual delivery of the newspaper to the home delivery subscriber. This means that when a newspaper dealer is terminated and replaced by employees working under the Union's jurisdiction, the adult carriers or drivers that he utilized are eliminated and replaced by boy carriers. RT 1447, 1553.

The 1967 collective bargaining agreement and the 1968 supplemental agreement between the Union and the Company (GC Exs. Nos. 2, 3) provides for the extension of the Union's jurisdiction on various specified dates to areas presently being handled by the individual respondents and other newspaper dealers. These agreements also provide that, "The dealer in any one or all of the above designated cities whose contract is terminated . . . shall, at the Employer's option, be permitted to continue in that same territory as an employee working under Union jurisdiction . . ." The Company does not consult with its newspaper dealers regarding whether or not they want to have their area converted to an employee operation. RT 1470-72.

The Union's area of claimed jurisdiction is open-ended. As stated by its president, Mr. Goldberger, "we are going to take jurisdiction on anything we can. If you deliver Jim Clips, rubber bands, whatever you use to cover up a wet newspaper, we claim jurisdiction for that." RT 1894. The Union has requested

jurisdictional recognition for as far away as Merced, California and Sacramento, California. RT 1829.

ARGUMENT

THIS CASE DOES NOT PRESENT ISSUES WHICH THE SUPREME COURT SHOULD DECIDE BY THE ISSUANCE OF A WRIT OF CERTIORARI

The Union's Petition ignores the fact that the granting of a writ of certiorari is not designed to give a second review of the evidence in support of the Board's decision. As pointed out below, this case does not fall into any of the categories outlined in Rule 19 of the Supreme Court Rules. The case merely involves the question of whether there was substantial evidence on the whole record to support the Board's finding that the provision of the agreement between the Company and Union requiring the termination of the Company's contracts with its non-union dealers was secondary in objective and therefore within the prohibition of Section 8(e) of the Act.

In *National Woodwork Manufacturers Association, et al. v. N.L.R.B.*, 386 U.S. 612, the Court held that an agreement falling within the literal terms of Section 8(e) is lawful if the Union's objective in obtaining the agreement was the *preservation* of work traditionally and customarily performed by employees in the unit covered by the agreement. The facts in the instant case establish that the Union's objective was one of *work acquisition rather than work preservation.*

Having failed to persuade the dealers to become members, the Union sought to force the same result through its collective bargaining agreement with the Company. Thus, as candidly admitted by Union President Jack Goldberger, he has sought unsuccessfully to organize the dealers prior to December 1955. RT 1971. Having failed to persuade the dealers to join the Union by the usual organizing methods, Goldberger decided to "approach it the next time in collective bargaining," the result of which was the termination clause at issue herein. RT 1874. However, as pointed out by the Third Circuit in *A. Duie Pyle, Inc. v. N.L.R.B.*, 383 F.2d 772, 777 (3d Cir. 1967), cert. denied, 390 U.S. 905, in which owner-operators of trucks leased to common carriers were, as here, required by a union-company contract to relinquish their status as independent contractors and to become union members:

> As in the case of secondary boycotts generally, a union may not employ a collective bargaining agreement with one employer as a means of effectuating its object to coerce another employer to unionize, *nor may it by this means seek to coerce self-employed persons to become union members.* (Emphasis supplied).

Here the self-employed dealers, in precise analogy to the owner-operators in *Pyle,* had a right under the Act to refuse to become union members, and the contract clause, which, in effect, required them either to join the union or to give up their means of livelihood, violated Section 8(e).

The Union argues however (Petition, p. 10) that the purpose of the clause was solely to follow the movement of subscribers to the suburbs and thus to preserve work traditionally performed by the unit employees from reductions resulting from such movement. However, even if one motive for effectuating the agreement may have been work preservation, it is clear that, as the Board stated, this aspect of the agreement "is incidental to the cessation of doing business instead of the other way around". CT 228.[3]

Thus, the record demonstrates that (1) no bargaining unit employees are shown to have been deprived of work because of the circulation shift; (2) the agreement permits dealers to continue to work their accustomed territories provide they accept employee status and join the Union; (3) such arrangements add no substantial work opportunities for bargaining unit employees but instead add only new employees who must become union members (CT 228); (4) the Union's jurisdiction will include geographical areas never before served by bargaining unit personnel;[4]

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[3]It is settled that only one object need be secondary in nature to substantiate a violation of the Act. *N.L.R.B. v. Denver Building and Construction Trades Council*, 341 U.S. 675, 689 (1951); *Riverton Coal Co. v. U.M.W.*, 453 F.2d 1035, 1040 (C.A. 6, 1972).

[4]Compare *Meat and Highway Drivers' Local 710 v. N.L.R.B.* 335 F.2d 709, 714 (D.C. Cir. 1964) (no violation found because union sought recapture of local meat delivery work once done by bargaining unit where packing plants moved out of Chicago inner-city area). Accord: *American Boiler Mfrs' Ass'n v. N.L.R.B.*, 404 F.2d 547, 552 (C.A. 8, 1968) cert. denied, 398 U.S. 960. Unlike the recaptured routes in *Local 710*, none of the dealer territories herein has ever been served by unit employees, and all the individual respondents have maintained their dealerships with the Company for substantial periods: Douglas Brown, seven years (RT 38);

and finally; (5) no showing was made that the termination was necessary to protect unit work standards. The record thus reveals that the "agreement was primarily aimed at" the dealers and their non-union status, and "was not for the purpose of preserving work for unit employees, and therefore, constituted an unlawful hot-cargo agreement." *Marriott Corp. v. N.L.R.B.*, 491 F.2d 367, 370 (1974), enforcing 197 NLRB No. 18 (1972), citing *National Woodwork, supra.*

In its petition to the Court, the Union has cited no evidence that the independent dealers threaten to displace unit employees from their jobs.[5] Indeed, the number of employees in the unit has increased since the nineteen forties. Furthermore, it is without dispute that the distribution of newspapers in geographical areas serviced by dealers was not previously performed by the bargaining unit. The Union has acknowledged that its concern was not limited to preserving the work of unit employees. As frankly stated by President Goldberger: "Our reasons for organizing the dealerships goes beyond just preservation

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Marvin Weissensee, six and one-half years (RT 207); Philip Walker, three years, ten months (RT 341); Willis Kolb, four years (RT 466); Walter DeLong, five years (RT 575); Kenneth Wollman, nine years (RT 693); Darrell Baker, six years, three months (RT 758); John Conway, six years (RT 859); Leroy Holbrook, four years, three months (RT 939); Wollman and Holbrook have been professional dealers for twenty years and DeLong for fifteen (RT 682, 939, 575).

[5]Cf. *National Woodwork, supra*, 386 U.S. at 644, n. 38 (listing "the remoteness of the threat of displacement by the banned product or services" as a critical factor in evaluating work preservation claims).

of work . . . [to] the purpose of creating work, which is our obligation as a labor organization". (RT 1939).[6] In these circumstances, the Union was clearly using the dealer termination clause not as "a shield carried solely to preserve members' jobs [in the unit]" *(National Woodwork, supra,* 386 U.S. at 630), but rather "as a sword" to organize the dealers outside the unit and to advance the interests of Union members generally. In short, the termination clause boils down to an agreement not to do business with any dealer who does not become a Union member; it reflects ". . . a concern with membership, not jobs." *N.L.R.B. v. Milk Drivers Union, Local 753,* 392 F.2d 845, 849 (7th Cir. 1968). As such, it is a union-signatory clause in reverse, for instead of requiring that no work be given to contractors who do not have agreements with the Union, it requires that contractors who already have the work give it up unless and until they become members of the Union. See *Pyle, supra; Retail Clerks Int'l Ass'n Local Union 1288 v. N.L.R.B.,* 390 F.2d 858, 862 (D.C. Cir. 1968); *N.L.R.B. v. National Maritime Union,* 486 F.2d 907, 913 (2nd Cir. 1973); Compare *District 9, IAM v. N.L.R.B.,* 315 F.2d 33, 36-37 (D.C. Cir. 1962); *Culinary Alliance Local 402,* 175 NLRB 161, 168-169 (1969), remanded on grounds of probable mootness, 436 F.2d 1379 (C.A. 9, 1971). As such it clearly violates Section 8(e).

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[6]Goldberger testified that conversion of dealership to union jurisdiction had resulted in a gain of "a man-and-a-half" to "two-and-a-half" in employment of union members (RT 1878-1879, 1921).

CONCLUSION

For the foregoing reasons, the individual respondents respectfully pray that the Petition for a Writ of Certiorari be denied.

Dated: June 16, 1975.

Respectfully submitted,

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Attorneys for the Individual Respondents.

In the Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-1453

NEWSPAPER AND PERIODICAL DRIVERS & HELPERS UNION, LOCAL 921, INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN & HELPERS OF AMERICA, PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1-3) is reported at 509 F.2d 99. Its earlier decision in the same case, *sub nom. Brown* v. *National Labor Relations Board*, is reported at 462 F.2d 699.[1] The Board's supplemental decision and order (Pet. App. 10-20) are reported at 204 NLRB 440. The Board's initial decision and order are reported at 194 NLRB 37.

JURISDICTION

The judgment of the court of appeals (Pet. App. 4-9) was entered on February 18, 1975. The petition for a writ of certiorari was filed on May 19, 1975. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

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[1]This Court denied certiorari, *sub nom. San Francisco Newspaper Printing Co.* v. *National Labor Relations Board*, 409 U.S. 1008.

QUESTION PRESENTED

Whether the Board properly found that an agreement between the company and the union requiring independent contractors to become employee-union members as a condition of continuing their dealerships with the company was designed not to protect the work of the bargaining unit represented by the union, but rather to increase union membership, in violation of Section 8(e) of the National Labor Relations Act.

STATUTE INVOLVED

The relevant provision of the National Labor Relations Act, as amended (61 Stat. 136, 73 Stat. 519, 29 U.S.C. 151, *et seq.*), is set out in the petition at pp. 2-3.

STATEMENT

The San Francisco Newspaper Printing Company (the Company) was established in 1965 by Hearst Publications and the Chronicle Publishing Co., to perform the mechanical and business functions for publication of their two Bay area newspapers (194 NLRB 37, 39). Newspaper and Periodical Drivers and Helpers Union, Local 921, IBT (the Union) has represented, since 1937, some categories of the Company's, and its predecessors', circulation employees (*ibid.*).

Circulation of the Company's papers within the city is handled by employees who are represented by the Union. Circulation in suburban areas is accomplished partly by employees represented by the Union and partly by dealers[2] who are not and never have been represented by the Union. (194 NLRB at 39, 41.)

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[2]The court of appeals, in its initial decision, found these dealers to be independent contractors. 462 F.2d 699, 706.

Over the years, the Union, which claims geographical jurisdiction within a 50-mile radius of San Francisco, has sought to expand the boundaries of its bargaining unit and has had limited successes (Pet. App. 12-13). Initially, the Union tried to organize the dealers, but, when that effort failed, the Union's president testified that it "decided to do it by contract, by collective bargaining" (Pet. App. 15). In March 1968, the Company and the Union executed a supplement to their existing collective bargaining agreement which provided that, on various dates between April 1, 1968 and July 1, 1972, the dealers would be terminated and the bargaining agreement would be extended to cover the distribution of newspapers in the localities then served by the dealers (Pet. App. 2, 21-22). This "Supplemental Agreement," affecting 37 dealers, added that (Pet. App. 22):

> (2) The dealer in any one or all of the above designated cities whose contract is terminated in accordance with the above terms shall, at the Employer's option, be permitted to continue in that same territory as an employee working under Union jurisdiction and so long as he remains continuously employed in the same territory shall not be subject to replacement in accordance with the seniority provisions of Section 26 but in all other respects shall be subject to the terms of this Agreement.

Thereafter, pursuant to this provision, whenever a dealership was terminated and the dealer was permitted to remain, he was absorbed into the collective bargaining unit. He was responsible for delivery as before but was required to become and remain a member of the Union under the union-security provisions of the collective bargaining contract. (194 NLRB at 41.)

Upon the termination of their dealerships, several dealers filed unfair labor practice charges with the Board alleging that the "Supplemental Agreement" violated Section 8(e) of the Act. In its initial decision, the Board, finding that the dealers were employees of the Company rather than independent contractors, dismissed the unfair labor practice complaint, 194 NLRB 37. On review, the court below found that the dealers were independent contractors and remanded the case to the Board for a determination of whether a violation of Section 8(e) had occurred, 462 F.2d 699.

On remand, the Board found that the provision in the Company-Union collective bargaining agreement which required termination of the dealer contracts with the Company was aimed principally at the non-union status of the dealers rather than at protection of the unit employees' work opportunities, and therefore was secondary and unlawful under Section 8(e) of the Act (Pet. App. 15). The Board stated (Pet. App. 14-15):

> In our view, * * * the work preservation aspect of the contract terminations under attack here is incidental to the cessation of doing business instead of the other way around. Respondents assert that placing the work of the dealers under the substantive provisions of the collective-bargaining agreement will create more jobs. But the agreement does not require that the work of the dealers be given to employees from the preexisting unit. It permits retention of the former independent dealers to continue distributing newspapers and it is reasonable to expect that many of the dealers would be so retained. Thus, no substantial work opportunities would necessarily be added for employees from the preexisting unit, but rather there would be new employees who must become union

> members. Furthermore, the unit would be expanded to cover geographical areas never within the unit, where any increase in the amount of work done by the independent dealers would not in itself cause any decrease in the amount of work available to unit employees. No claim is made here that changing dealers into unit employees is necessary to preserve union standards within the unit or to discourage contracting of unit work. [Footnotes omitted.][3]

The Board ordered both the Union and the Company to cease and desist from effectuation of the agreement, ordered the Company to offer to reinstate the dealership contracts of all dealers terminated within six months of the filing of the charges, and ordered both Company and Union to post appropriate notices (Pet. App. 16-17).

The court of appeals found "substantial evidence * * * to support the Board's findings that the Union and the Company violated §8(e) of [the Act]," and enforced its order (Pet. App. 2). The court stated (*ibid.*):

> The Board correctly found that "work preservation" was not the primary object of the contract termination provision, and in so doing it properly applied the rule of *National Woodwork Manufacturers Assoc.* v. *N.L.R.B.*, 386 U.S. 612 (1967).

ARGUMENT

In *National Woodwork Manufacturers Assoc.* v. *National Labor Relations Board*, 386 U.S. 612, 644, this Court held that whether an agreement restricting business relations between two persons violates Section 8(e) of the National Labor Relations Act turns on "whether, under all

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[3]The Board also noted that "the Union's president admitted that, after failing in attempts to organize the dealers, the Union 'decided to do it by contract, by collective bargaining'" (Pet. App. 15).

the surrounding circumstances, the Union's objective was preservation of work for [the unit] employees, or whether the agreements * * * were tactically calculated to satisfy union objectives elsewhere [footnote omitted]." If the agreement has the former objective, it is primary and lawful; if it has the latter objective, it is secondary and unlawful. Agreements which require "that specific work be done by members of the bargaining unit" or only in accordance with "union work standards" are primary; but those which restrict work opportunities to union members are secondary. *Local 814, Teamsters* v. *National Labor Relations Board*, 512 F.2d 564, 566 (C.A.D.C.), and cases cited therein. See also *National Labor Relations Board* v. *National Maritime Union*, 486 F.2d 907 (C.A. 2), certiorari denied, May 12, 1975 (No. 74-1102).

The only question presented by the petition is whether the Board properly concluded that the principal thrust of the agreement here was to expand the Union's membership rather than to preserve work opportunities for the unit employees. Such an issue, involving only the application of settled principles to the particular facts of this case, does not warrant review by this Court. In any event, the circumstances outlined by the Board (*supra*, pp. 4-5) fully support its conclusion here.[4]

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[4] *Meat & Highway Drivers, Local 710* v. *National Labor Relations Board*, 335 F.2d 709 (C.A.D.C.), on which petitioner relies (Pet. 12), is not to the contrary. There the union sought, principally, to expand the work opportunities of the bargaining unit in a situation of shrinking job opportunity (335 F.2d at 714). To the extent that the union also sought to increase its membership rather than to preserve work opportunities for the bargaining unit, its conduct was found violative of Section 8(e) (*id.* at 717).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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JUNE 1975.